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NO. 88-49

In The
Supreme Court Of The United States
OCTOBER TERM, 1988

CALVIN BERRY, *et al*,
Petitioners,
vs.

THE CITY OF DALLAS, TEXAS, *et al*,
Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

RESPONDENTS' BRIEF IN OPPOSITION

CARROLL R. GRAHAM
Counsel of Record

MARK K. O'BRIANT
Assistant City Attorney

OFFICE OF THE CITY ATTORNEY
7BN City Hall
1500 Marilla Street
Dallas, Texas 75201
(214) 670-3510

Attorneys for Respondents

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STATEMENT OF THE CASE

Respondent City of Dallas is not satisfied with Petitioners' statement of the case and offers the following by way of clarification.

After considering the studies of other metropolitan cities on the effects of sexually oriented businesses upon neighborhoods, as well as its own crime rate study, the City of Dallas enacted a Sexually Oriented Business Ordinance, codified as Chapter 41A of the Dallas City Code.¹ The ordinance regulates sexually oriented businesses in two basic ways: zoning restrictions and a license requirement.

¹The Ordinance as originally passed is contained in Appendix D of the Petition for Certiorari.

The zoning provisions prohibit adult businesses from locating within 1000 feet of a church, school, residential area, public park adjacent to a residential area, or another sexually oriented business. Businesses located within 1000 feet of one of the prohibited areas are given a three-year amortization period if they were already operating on the effective date of the Ordinance.²

Immediately after passage of the Ordinance, a variety of adult entertainment establishments attacked its constitutionality in three separate federal suits, one of which was brought by Petitioners. Petitioners in this case are owners of motels which permit rooms to be rented for two-hour periods. Pet. at 6. They are thus classified by the Ordinance as "adult motels."³ The Ordinance does not prohibit motels from renting rooms by the hour. It simply classifies those who do so as "adult motels" and makes them subject to the zoning restrictions of the Ordinance.

Each of the three suits sought declaratory and injunctive relief. The suits were consolidated and the case was submitted for decision on cross-motions for summary judgment filed by all parties. No party objected to resolution of the issues by summary judgment.⁴

The District Court upheld the constitutionality of the Ordinance, with the exception of four relatively minor provisions dealing with licensing. *Dumas v. City of Dallas*, 648 F. Supp. 1061 (N.D. Tex. 1986). These sections were later amended or deleted to comport with the Court's ruling.⁵

²Section 41A-13, Dallas City Code.

³Section 41A-2(4), Dallas City Code.

⁴See *FW/PBS v. City of Dallas*, 837 F.2d 1298, 1303 (5th Cir. 1988), and *Dumas v. City of Dallas*, 648 F.Supp. 1061, 1064 n. 5, and 1068 n. 17 (N.D. Tex. 1986).

⁵See Ordinance 19377, enacted October 12, 1986, included herein as Appendix A.

The District Court made a number of significant findings. First, the Court found that the Ordinance was content-neutral, focusing on the secondary effects of sexually oriented businesses and having only an incidental impact on protected speech, and that it satisfied the four-part test of *United States v. O'Brien*, 391 U.S. 367 (1968). Second, the Court found that the land available for the relocation of existing businesses and the establishment of new businesses was substantial, constituting 8-10% of the City's total area.⁶ The Court further found that the Ordinance's three-year amortization period was generous and constituted "... a valid mechanism used to enforce valid locational regulations."⁷ The Court upheld all provisions of the Ordinance dealing with adult motels.

The Fifth Circuit upheld the District Court decision in all respects. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988).

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

The Petition Raises No Substantial Constitutional Issue

The Dallas Sexually Oriented Business Ordinance includes "adult motels" among the regulated uses subject to zoning restrictions.

Adult motels are primarily defined as those which offer rooms for rental for periods of less than ten hours.⁸ The City Council of Dallas found that the rental of motel rooms on an hourly basis facilitates prostitution, and that the motels in Dallas renting rooms for short periods of time are

⁶*Dumas v. City of Dallas*, 648 F.Supp. 1061, 1070-71 (N.D. Tex. 1986).

⁷*Id.* at 1071.

⁸Section 41A-2(4), Dallas City Code.

associated with prostitution and contribute to neighborhood deterioration. (DX 17). This finding was upheld by the District Court.⁹

Petitioners are owners of adult motels which offer rooms for rental in two-hour increments. Pet. at 6. Petitioners' brief offers several grounds of error, none of which merit review by this Court.

First, Petitioners complain that the City of Dallas conducted no new studies prior to enacting the Ordinance. Pet. at 7. Petitioners' argument is controlled squarely by *City of Renton v. Playtime Theatres, Inc.*¹⁰ In reviewing a similar zoning ordinance regulating the location of sexually oriented businesses, this Court rejected the notion that a City must conduct its own studies before enacting an ordinance, stating

The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies on is *reasonably believed to be relevant* to the problem that the city addresses. *City of Renton v. Playtime Theatres, Inc.*, 89 L.Ed.2d at 40 (1986) (emphasis added).

The City of Dallas did in fact rely upon evidence pertaining to adult motels in its consideration of the Ordinance. In addition to the public testimony received by the City Council (DX 17), the Council considered a study conducted by the City of Los Angeles (DX 11) which included adult motels. The City of Dallas was entitled to rely upon the experience and studies of other cities it believed to be

⁹*Dumas v. City of Dallas*, 648 F.Supp. 1061, 1076 (N.D. Tex. 1986).

¹⁰475 U.S. 41, 106 S.Ct. 425, 89 L.Ed.2d 29 (1986).

relevant to the problems generated by adult motels, and the District Court found the City's reliance to be supported by the record.

Petitioners cite a pre-*Renton* case, *Patel and Patel v. City of South San Francisco*, 606 F.Supp 666 (N.D. Cal. 1985), which is easily distinguishable. The district court in that case found that not only had the city failed to conduct its own study, it did not consider or introduce into the record the studies of *any other city* dealing with adult motels prior to passing its ordinance. *Patel and Patel*, 606 F.Supp. at 671-72.¹¹

Next, Petitioners assert that the Ordinance is unconstitutional for a variety of reasons, each of which is unsupported by adequate explanation or citation of authority. The allegation is made that the Ordinance's definition of "adult motel" is vague and overbroad (Pet. at 6), yet the argument proceeds no further, and no authority is cited. Respondents are unable to respond to the allegation without further clarification. The District Court upheld all definitions in the Ordinance against vagueness challenges.¹²

The same defect is found in the allegation that the Ordinance as applied to adult motels constitutes a prior restraint and is "an attempt to censor adult-oriented activities . . ." Pet. at 6-7. Since motels do not disseminate First Amendment materials, it is unknown what speech is allegedly being suppressed by the City, and Petitioners offer no illumination. There is also no explanation as to what "adult-oriented activities" are being censored. The Ordinance does not regulate consensual activity within motels.

¹¹Also, the definition of "adult motel" in the *Patel* ordinance differs markedly from that of the Dallas ordinance.

¹²*Dumas v. City of Dallas*, 648 F.Supp. at 1075-76.

Similarly, the allegation is made that the Ordinance deprives adult motel owners of property without Due Process of law but fails to adequately explain or cite legal authority. The Ordinance does not prohibit motels from renting rooms by the hour.¹³ It simply defines those who do as "adult motels" and makes them subject to the same types of locational restrictions as were upheld in *Young v. American Mini-Theatres, Inc.*,¹⁴ and *City of Renton*.

Petitioners also assert that the Ordinance violates the Equal Protection Clause because it does not apply to *all* motels but only to those which rent rooms for periods less than ten hours. This Court held in *Young v. American Mini-Theatres* that a city may treat sexually oriented businesses differently because they have "markedly different effects upon their surroundings."¹⁵ Even in the area of protected expression, the government may tailor its reaction to different messages according to the degree to which its interests are implicated.¹⁶

The City's interest here is substantial, as noted by the Fifth Circuit:

Once again . . . we find the City's interest to be self-evident and substantial. It is certainly within reason that short rental periods facilitate prostitution, one of the criminal effects with which the City Council was most concerned. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d at 1304.

The high incidence of prostitution at motels permitting rooms to be rented for only two hours, like those of Petitioners, justifies the differing treatment. The reasoning of

¹³Section 41A-18(b) creates an offense for *unlicensed* motels to rent rooms in increments of less than ten hours.

¹⁴427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).

¹⁵*Young*, 427 U.S. at 82 n. 6 (Powell, J. concurring)

¹⁶*Id.*

Young v. American Mini-Theaters applies with even greater force to commercial establishments which do not disseminate First Amendment materials, such as adult motels. Petitioners have shown no Equal Protection violation.¹⁷

Last, Petitioners assert that the Ordinance is an unconstitutional "infringement on the individual's right to freedom of association." Pet. at 7. The only illumination given on this point is the statement that individuals "have the right to freely associate in a motel room owned by the Petitioners and have the right to check out within any given period of time or to stay as long or as short as they desire." Pet. at 7.

This statement is puzzling to Respondents since the Ordinance makes no restriction on who may patronize an adult motel and does not regulate activities within a motel room. Similarly, the Ordinance makes no restrictions on "the right to check out" at any given time, if such a right exists. Petitioners' charge of infringement on the right of freedom of association is a bare allegation, unsupported by fact or law.

¹⁷See also *Pollard v. Cockrell*, 578 F.2d 1002, 1013 (5th Cir. 1978) (City may exempt from a massage parlor ordinance institutions like hospitals which are unlikely to serve as subterfuges for prostitution).

CONCLUSION

The Petition for Writ of Certiorari raises no substantial constitutional issue and should be denied by this Court.

Dated: July 12, 1988

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY
CITY OF DALLAS, TEXAS
7BN City Hall
1500 Marilla Street
Dallas, Texas 75201
(214) 670-3510

By Carroll R. Graham
CARROLL R. GRAHAM
Counsel of Record
State Bar of Texas
No. 08257000

By Mark K. O'Briant
MARK K. O'BRIANT
Assistant City Attorney
State Bar of Texas
No. 15165700

Attorneys for Respondents

APPENDIX A

ORDINANCE NO. 19377

An ordinance amending Sections 41A-2, 41A-5, 41A-7, 41A-10, and 41A-13 of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended; amending definitions; adding definitions of "residential district" and "residential use"; amending provisions dealing with the issuance of licenses for sexually oriented businesses; amending inspection provisions; amending revocation provisions; providing a penalty not to exceed \$1,000; providing a saving clause; providing a severability clause; and providing an effective date.

WHEREAS, the city plan commission and the city council, in accordance with the provisions of state law and the applicable ordinances of the city, have given the required notices and have held the required public hearings regarding this amendment to CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended; and

WHEREAS, on June 18, 1986, the city council passed Ordinance No. 19196, which amended the Dallas City Code, as amended, by adding Chapter 41A, "SEXUALLY ORIENTED BUSINESSES"; and

WHEREAS, on August 6, 1986, the city council adopted Resolution No. 86-2453, clarifying certain definitions in Ordinance No. 19196; and

WHEREAS, Section 3 of Resolution No. 86-2453 directed the city attorney to draft an ordinance amending Section 41A-13(a) of the city code in a manner consistent with the intent expressed in Resolution No. 86-2453; and

WHEREAS, the city attorney has drafted this ordinance in accordance with the directive of Resolution No. 86-2453; and

WHEREAS, the city attorney has further advised that enforcement of Ordinance No. 19196 can be enhanced by amending certain of its provisions dealing with issuance and revocation at licenses and inspection provisions relating to sexually oriented businesses; Now, Therefore,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That Subsection (13) of Section 41A-2, "Definitions," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended to read as follows:

"(13) NUDITY or a STATE OF NUDITY means:

(A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast, or

(B) *a state of dress which fails to opaquely cover a human buttock, anus, male genitals, female genitals, or areola of the female breast.*"

SECTION 2. That Subsections (15) through (21) of Section 41A-2, "Definitions," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, are hereby renumbered as Subsections (17) through (23) respectively.

SECTION 3. That Section 41A-2, "Definitions," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended by adding new Subsections (15) and (16) to read as follows:

"(15) RESIDENTIAL DISTRICT means a single family, duplex, townhouse, multiple family or mobile home zoning district as defined in the Dallas Development Code.

(16) RESIDENTIAL USE means a single family, duplex, multiple family, or "mobile home park, mobile home subdivision, and campground" use as defined in the Dallas Development Code."

SECTION 4. That Section 41A-5, "Issuance of License," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended is amended to read as follows:

"SEC. 41A-5. ISSUANCE OF LICENSE.

(a) The chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:

(1) An applicant is under 18 years of age.

(2) An applicant or an applicant's spouse is overdue in his payment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business.

(3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.

(4) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a sexually oriented business without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

(5) An applicant is residing with a person who has been denied a license by the city to operate a sexually oriented business within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months.

(6) The premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.

(7) The license fee required by this chapter has not been paid.

(8) An applicant has been employed in a sexually oriented business in a managerial capacity within the preceding manage a sexually oriented business premises in a peaceful and law-abiding manner, *thus necessitating action by law enforcement officers.*

(9) An applicant or the proposed establishment is in violation of or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19 or 41A-20.

(10) An applicant or an applicant's spouse has been convicted of [~~or is under indictment or misdemeanor information for~~] a crime:

(A) involving:

(i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:

(aa) prostitution;

(bb) promotion of prostitution;

(cc) aggravated promotion of prostitution;

- (dd) compelling prostitution;
- (ee) obscenity;
- (ff) sale, distribution, or display of harmful material to minor;
- (gg) sexual performance by a child;
- (hh) possession of child pornography;
- (ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code:
 - (aa) public lewdness;
 - (bb) indecent exposure;
 - (cc) indecency with a child;
 - ~~[(iii) engaged in organized criminal activity as described in Chapter 71 of the Texas Penal Code;]~~
 - (iii) ~~[(iv)]~~ sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;
 - (iv) ~~[(v)]~~ incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code;
 - ~~[(vi) kidnapping or aggravated kidnapping as described in Chapter 20 of the Texas Penal Code;]~~
 - ~~[(vii) robbery or aggravated robbery as described in Chapter 29 of the Texas Penal Code;]~~
 - ~~[(viii) bribery or retaliation as described in Chapter 36 of the Texas Penal Code;]~~
 - ~~[(ix) a violation of the Texas Controlled Substances Act or Dangerous Drugs Act punishable as a felony, Class A misdemeanor, or Class B misdemeanor;]~~ or

(v) ~~(4A)~~ criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;

(B) for which:

(i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;

(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.

(b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.

(c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10) ~~(, for which the required time period has elapsed since the date of conviction or the date of release from confinement imposed for the conviction,)~~ may qualify for a sexually oriented business license only *when the time period required by Section 41A-5(a)(10)(B) has elapsed. (if the chief of police determines that the applicant or applicant's spouse is presently fit to operate a sexually oriented business. In determining present fitness under this section, the chief of police shall consider the following factors concerning the applicant or applicant's spouse, whichever had the criminal conviction;*

~~(1) the extent and nature of his past criminal activity;~~

~~(2) his age at the time of the commission of the crime;~~

~~(3) the amount of time that has elapsed since his last criminal activity;~~

~~(4) his conduct and work activity prior to and following the criminal activity;~~

~~(5) evidence of his rehabilitation or rehabilitative effort while incarcerated or following release; and~~

~~(6) other evidence of his present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for him; the sheriff and chief of police in the community where he resides; and any other persons in contact with him.~~

~~(d) It is the responsibility of the applicant, to the extent possible, to secure and provide to the chief of police the evidence required to determine present fitness under subsection (c) of this section.]~~

(d) ~~(e)~~ The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time."

SECTION 5. That Section 41A-7, "Inspection," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended by adding a new Subsection (c), to read as follows:

"(c) The provisions of this section do not apply to areas of an adult motel which are currently being rented by a customer for use as a permanent or temporary habitation."

SECTION 6. That Subsections (d) and (e) of Section 41A-10, "Revocation," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, are amended to read as follows:

"(d) Subsection (b)(7) does not apply to adult motels as a ground for revoking the license unless the licensee or employee knowingly allowed the act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in a public place or within public view.

(e) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a sexually oriented business license for one year from the date revocation became effective. If, subsequent to revocation, the chief of police finds that the basis for the revocation has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became effective. If the license was revoked under Subsection (b)(5), an applicant may not be granted another license until the appropriate number of years required under Section 41A-5(a)(10)(B) has elapsed [~~since the termination of any sentence, parole, or probation~~]."

SECTION 7. That Subsection (a) of Section 41A-13, "Location of Sexually Oriented Businesses," of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as amended, is amended to read as follows:

"(a) A person commits an offense if he operates or causes to be operated a sexually oriented business within 1,000 feet of:

- (1) a church;
- (2) a public or private elementary or secondary school;
- (3) a boundary of a residential district as defined in this chapter [~~by the Dallas Development Code~~];
- (4) a public park adjacent to a residential district as defined in this chapter [~~by the Dallas Development Code~~];
or
- (5) the property line of a lot devoted to a residential use as defined in this chapter."

SECTION 8. That a person violating a provision of this ordinance, upon conviction, is punishable by a fine not to exceed \$1,000.

SECTION 9. That CHAPTER 41A of the Dallas City Code, as amended, shall remain in full force and effect, save and except as amended by this ordinance.

SECTION 10. That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of CHAPTER 1 of the Dallas City Code, as amended.

SECTION 11. That this ordinance shall take effect immediately from and after its passage and publication in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so ordered.

October 12, 1986